STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

LAZ PARKING LTD, LLC	)	
	)	
Petitioner,	)	
And	)	
	)	
COMMONWEALTH EDISON COMPANY	)	**Docket No. 12-0324**
	)	
Respondent.	)	
	)	
Complaint pursuant to Sections 9-250 and	)	
10-108 of the Illinois Public Utilities Act	)	
And Section 200.170 of the Rules of Practice	)	
Of the Illlinois Commerce Commission	)	

BRIEF ON EXCEPTIONS

OF

LAZ PARKING LTD, LLC

September 16, 2016

ORAL ARGUMENT REQUESTED

BRIEF ON EXCEPTIONS
OF
LAZ PARKING LTD, LLC

(ORAL ARGUMENT REQUESTED)

LAZ Parking LTD, LLC, an Illinois limited liability company ("LAZ"), by its attorney Law Offices of Paul G Neilan, P. C., for its Brief on Exceptions pursuant to 83 Ill. Adm. Code 200.830[1], states as follows:

I. Background

LAZ operates parking garages in the City of Chicago, one of which is at the service location of 25 N. Michigan Avenue. LAZ's Commonwealth Edison Company ("ComEd") account at that service location is 2931008045 (the "Account").

In December 2007, ComEd installed meter number 141362866, which is the meter at issue in this case (the "Meter," or "141362866"). Because of the magnitude of LAZ's load at this service location, current transformers ("CTs") are used to step down the current so that it can be measured by the Meter. The Meter is thus "associated with" an instrument transformer (i.e., the CTs) and is also sometimes referred to as "transformer rated."

The regulations of the Illinois Commerce Commission (the "Commission," or the "ICC") set forth specific requirements for testing (or inspection) of meters such as 141362866. These regulations include 83 Ill. Adm. Code Section 410.155[2], which requires a test or inspection within 90 days after a transformer rated meter such as 141362866 is installed in order to ensure that the meter is accurately recording the customer's energy consumption. The record evidence in

[1]Rules of procedure of the Commission set forth at 83 Ill. Adm. Code Section 200.10 et seq. are hereinafter referred to as the "Commission Rules" and abbreviated as "Comm. Rule."

[2]Regulations of the Commission set forth in 83 Ill. Adm. Code Part 410 and other parts (e.g., 83 Ill. Adm. Code Part 280) are hereinafter referred to as "Commission Regulations" and abbreviated as "Comm. Reg."

this case is indisputable, and the Commission properly found, that ComEd failed to perform any such test or inspection of 141362866 until 2010, long after the mandatory 90-day period had expired. ComEd thus failed to comply with all of the testing and inspection requirements of Part 410 of the Commission Regulations

On or about July 12, 2010, LAZ's then-current electricity supplier, MidAmerican Energy Company ("MidAm"), sent LAZ a re-bill in the amount of $861,756.06, which it alleged was attributable to unbilled supply and delivery service from the Account's August 2008 through its May 2010 billing periods.[3] In its supply arrangement with MidAm, LAZ elected single billing under Rate SBO, so that MidAm billed LAZ for both supply service and ComEd delivery services charges.

LAZ filed a formal complaint contesting these alleged unbilled charges in May 2012.

On August 11, 2016, the Commission issued its Proposed Order (the "Proposed Order") in this Docket. LAZ agrees with the Proposed Order's finding that under Comm. Reg. 410.200(h)(1) ComEd may not adjust its billing on the Account due to its failure to comply with all of the testing and inspection requirements of Part 410 of the Commission Regulations. LAZ therefore supports the Proposed Order's conclusion that ComEd is barred from collecting from LAZ $180,943.15, which is attributable to alleged delivery services charges, together with appropriate interest to be credited to LAZ's Account.

However, for the reasons set forth below LAZ takes exception to the Proposed Order's finding that LAZ may not recover ComEd's additional billing of $36,625.07, and consequently

[3] Prior to the Account's July 2008 meter read date, LAZ took electricity supply service from Pepco Energy Services, Inc. ("Pepco"). Pepco did not offer a single billing option under Rate SBO, and therefore during the tenure of the Pepco supply arrangement LAZ received one periodic bill from Pepco for supply service and a separate periodic bill from ComEd for delivery services charges.

LAZ takes exception to the Proposed Order's denial of LAZ's claim under Count V of the Complaint.

LAZ also takes exception to two other provisions of the Proposed Order, namely (I) certain statements in the Proposed Order concerning the *Amcor Flexibles v. ComEd* docket (i.e., Ill. C.C Dkt. No. 11-0033), and (ii) the Proposed Order's failure to correct ComEd's counsel's misstatement of certain arguments made by LAZ in connection with ComEd's Rule 216[4] admissions in this case.

II. EXCEPTION 1: THE PROPOSED ORDER ERRS IN DENYING LAZ'S CLAIM FOR $36,625.07 UNDER COUNT V OF THE COMPLAINT

A. Revisions to Proposed Order

For the reasons set forth below, LAZ requests that the Commission adopt the following language for Proposed Order, Section VI - Commission Analysis and Conclusions, B - The Disconnection Notice; the original language appears at pages 45-46 of the Proposed Order:

> VI. COMMISSION ANALYSIS AND CONCLUSIONS
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> ...
>
> B. The Disconnection Notice
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> Although ComEd has ~~provided~~offered evidence that the $36,625.07 at issue in the Disconnection Notice related to delivery service provided by ComEd to LAZ in a later time frame (May 3, 2010 and September 1, 2010). ComEd Ex. 4.0 at 5; ComEd Ex. 4.05~~.~~, this evidence cannot be considered as it contradicts ComEd's Rule 216 judicial admissions made under LAZ's Requests to Admit, as well as the ALJ's Ruling of February 13, 2014 granting LAZ's Motion to Deem Admitted and the ALJ's Ruling of March 9, 2015 denying ComEd's Motion for Reconsideration of that earlier

[4]Given the frequency with which Illinois Supreme Court Rule 216 issues are discussed, that rule is referred to simply as "Rule 216." Other Illinois Supreme Court Rules are herein referred to as "S. Ct. R."

ruling. Under ComEd's Rule 216 judicial admissions, these charges represent delivery services charges for periods prior to LAZ's June 2008 billing period. ComEd claimed this amount in a disconnection notice issued to LAZ on September 20, 2010 (Complaint, Exhibit C).

According to ComEd, contrary to LAZ's claims and the Rule 216 admissions, ~~LAZ was billed~~these charges are for ~~this~~ delivery service between July 9, 2010 and September 1, 2010, and not for ~~prior~~ unbilled service prior to the June 2008 bill period. ~~-~~ ComEd Ex. 4.0 at 5. Specifically, ComEd contends that the Disconnection Notice concerned ~~the~~ four months of 2010 delivery service charges that total $36,143.30; and five late fees that total $1,196.83; minus a credit in the exact amount of those late fees, that results in total charges and a corresponding payment amount by LAZ of $36,143.30. ComEd Ex. 4.0 at 6; ComEd Ex. 4.03 at CCLP 0000011-12; ComEd Ex. 4.06; ComEd Init. Br. at 23.

ComEd contends that LAZ does not provide any evidence aside from the admissions themselves and the ALJ ~~ruling on Request to Admit # 6 supporting the assertion~~rulings that this charge is for pre ~~May 2010~~re-bill period unbilled service. ~~LAZ suggests that this sum should be assessed against ComEd as a discovery sanction because of its failure to comply with the requirements of Ill. Supreme Court Rule 216. Although the ALJ sanctioned ComEd by deeming the LAZ Requests to Admit (including liability for the $36,143.30) as admitted, the evidence clearly indicates that the amount was for services that occurred after the meter billing error had been corrected.~~

~~Although the sanctions for failing to make a timely denial of requests to admit pursuant to Supreme Court rule 216 can result in binding judicial admissions, case law supports the proposition that a "request to admit facts is designed to eliminate the need to prove facts which are not in dispute, and it is not appropriate for a party to prove [its] case by use of this procedure where ultimate facts are fairly disputed." People v. Strasbaugh, 194 Ill.App.3d 1012, 1017 (4th Dist. 1990).~~

~~Moreover, Illinois Supreme Rule 201(j) provides that:~~

~~Disclosure of any matter obtained by discovery is not conclusive, but may be~~ComEd cites the cases of *Ellis v. American Family Mut. Insurance Co.*, 322 Ill. App. 3d 1006 (4th Dist. 2001) and *New Amsterdam Casualty Co. v. Waller*, 323 F.2d 20 (1963) in support of its assertion that a judge may disregard an admission if it appears that the facts in the admission are untrue.

But *Ellis* actually supports LAZ's position, not ComEd's. *Ellis* concerned the death of a young man in an accident that occurred while he was driving his mother's car. 322 Ill. App. 3d at 1008. The mother's insurer denied coverage on grounds that the son was not an "insured person" within the meaning of the policy because the mother had stated in response to a Rule 216 request for admission that he owned his own car at the time of the accident. 322 Ill. App. 3d at 1009. This statement in the mother's Rule 216 admission was, in fact, neither correct nor true because her son did not own his own car at the time of the accident; this was revealed during her subsequent discovery deposition in which she contradicted her earlier Rule 216 response. 322 Ill. App. 3d at 1009-10. While her deposition statement that her son didn't own a car at the relevant time was true, the *Ellis* court refused to allow that testimony to overturn her Rule 216 admission, and it affirmed the lower court's decision in favor of the insurer and denying coverage. 322 Ill. App. 3d at 1010.

New Amsterdam is not relevant to this case because while it concerns an admission contradicted by other evidence, it does not concern a Rule 216 judicial admission. *New Amsterdam* concerned a judgment creditor's attempt to attach a North Carolina home built in part with funds fraudulently transferred by a judgment debtor. 323 F.2d at 23. The transferee of the funds sought to bar the creditor's recovery because its lawyer had, in an earlier filing, advanced a theory of the case that made judgment in the creditor's favor insupportable. 323 F.2d at 24-25. The federal appellate court rejected the transferee's contention that the lawyer's statement was a judicial admission. 323 F.2d at 24-25. New Amsterdam is irrelevant not only because it concerns North Carolina law, but also because it has nothing

to do with requests for admission under Rule 36 of the Federal Rules of Civil Procedure, the federal analog of Rule 216.

The record in this case shows LAZ's efforts during 2012 to conduct discovery by means of data requests and interrogatories to ComEd, which are well within the informal means of discovery approved by Commission policy. 83 Ill. Adm. Code Section 200.340. The record also shows ComEd's continual failure or refusal to respond to LAZ's repeated requests to resolve discovery differences under Commission Rule 200.350, 83 Ill. Adm. Code Section 200.350. ComEd bases its objections to LAZ's requests for admission on ensuring the truth and integrity of the record in Commission proceedings. But the record in all Commission proceedings depends in the first instance on good faith cooperation in discovery among the parties. ComEd's continual failure or refusal to respond to LAZ's repeated and reasonable requests to resolve discovery issues in 2012 exhibits a blatant and contumacious disregard for the integrity of the evidentiary record in Commission proceedings. Therefore ComEd will not be heard to complain about its Rule 216 admissions. Even after LAZ issued its requests for admission, ComEd had the opportunity to conform its responses to Rule 216. It failed to do so. Its inattention to the requirements of requests for admission under Rule 216 merely reflects a continuation of ComEd's scornful attitude towards LAZ's efforts at discovery. ComEd argues that this sum operates as a discovery sanction, but ComEd was the cause of its own difficulties because it failed to comply with Commission policy on discovery and then further failed to comply with the requirements of Ill. Supreme Court Rule 216.

Illinois Supreme Court Rule 201(j) provides that matters disclosed by discovery are not conclusive, but may be contradicted by other evidence, but this general rule of discovery does not control over the specific requirements of Rule 216. An admission obtained by some means of discovery other than Rule 216 (for example, a statement or admission against interest during a discovery deposition) would fall under this general rule. But an admission under such circumstances is not a Rule 216 admission.

In addition to the foregoing, the ALJ's Orders of February 13, 2014 and March 9, 2015 dealing with ComEd's challenges to its Rule 216 admissions were entered in this docket after full briefing and oral argument on LAZ's original Motion to Deem Admitted, and the $36,625.07 was admitted to relate to periods prior to June 2008. Those rulings settled issues of fact and law, were thoroughly litigated and finally ruled on, twice, by the ALJ. Therefore, they stand as the law-of-the-case in this Docket, and the Commission's Order may not reverse those rulings.

~~T~~ComEd claims that the record is devoid of evidence supporting the assertion that th~~e~~is amount ~~at issue in Request to Admit #6~~ was due to charges accrued more than two years prior to the discovery of the under registering LAZ meter/transformer installation at 25 W. Washington Boulevard at issue here. ~~On the contrary, there is ample evidence that in fact the charges were for delivery services occurring after May 3, 2010.~~ LAZ did not present any evidence to speak to that issue. ComEd's point is noted, but it does not change the result. Had LAZ presented any such evidence, then it would not have been entitled to rely on the related Rule 216 admissions. As an administrative agency, the Commission's decision must be based on the evidence of record. Under Rule 216, ComEd's judicial admissions stand of record, and evidence contradicting those admissions will not be heard. The Commission therefore declines ~~LAZ's~~ComEd's argument and finds that ~~the payment~~ComEd's collection of $36,625.07 at issue from the disconnection notice is barred by the two year limitation of Section 280.100(a)(2)

B. ComEd Has Never Ceased To Re-Litigate Its Rule 216 Admissions

LAZ filed its Motion to Deem Admitted[5] on November 13, 2012. ComEd filed its Response in Opposition to that motion on December 17, 2012. LAZ filed its Reply in Support of its Motion to Deem Admitted on January 11, 2013. On June 28, 2013, then-ALJ Benn heard oral

[5] I.e., LAZ's Motion to Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto

argument on LAZ's Motion to Deem Admitted. LAZ did not time the duration of the June 28, 2013 oral argument, but the transcript of that argument is 119 pages long (i.e., numbered pages 27-146).

On February 13, 2014, then-ALJ Benn issued her Order granting LAZ's Motion to Deem Admitted. Among other things, the February 13, 2014 Order stated that:

- Contrary to ComEd's argument, Rule 216 does apply in Commission proceedings and controls in this Docket (February 13, 2014 Order, pgs. 2-3); and
- Contrary to ComEd's argument, its failure to conform its responses to the requirements of Rule 216 are not mere technicalities. (February 13, 2014 Order, pg. 5).

Ten contested requests that were the subject of LAZ's Motion to Deem Admitted were deemed admitted under Rule 216 in the February 13, 2014 Order.

On February 27, 2014, ComEd filed its Motion for Reconsideration[6] of the ALJ's February 13, 2014 Order. LAZ filed its response to ComEd's Motion for Reconsideration on March 27, 2014. ComEd filed its reply to LAZ's response on April 17, 2014.

On March 9, 2015, then-ALJ Benn issued her Order denying ComEd's Motion for Reconsideration. Specifically, the ALJ's Order stated:

> ComEd continues to protest against the use of Supreme Ct. Rule 216 as it pertains to their response to the Requests to Admit. The Respondent [i.e., ComEd] **has not produced any new arguments to support their position** that the Commission is expressly prohibited from using the Supreme Court Rules and the Code of Civil Procedure in this matter.

(March 9, 2015 Order, pg. 3) (Emphasis added).

The ALJ went on to state that ComEd should have objected to LAZ's requests to admit before it tendered its answers. (March 9, 2015 Order, pg. 4), and questioned how ComEd could

[6] Respondent's Motion to Reconsider the ALJ Ruling of February 13, 2014.

protest the application in proceedings before the Commission of certain Supreme Court Rules and provisions of the Illinois Code of Civil Procedure, while at the same time relying on those very same Supreme Court Rules and Civil Procedure provisions as the basis for its Motion for Reconsideration.

ComEd has never answered that question.

Despite full briefing on Rule 216 issues, despite 119 pages worth of oral argument on those same Rule 216 issues, despite full briefing on a ComEd Motion for Reconsideration that raised no new issue that might justify reconsideration, and despite not one, but two (2) ALJ Orders deciding the Rule 216 issues in this Docket against ComEd, it has never ceased to re-litigate Rule 216 issues that have already been decisively adjudicated against it. Attached to this Brief as Exhibit A is a schedule of every pleading and event in this Docket in which ComEd has re-litigated Rule 216 issues.

That schedule evinces ComEd's blatant and contumacious disregard for the Orders of February 13, 2014 and March 9, 2015, and, worse, an apparent strategy of repeating its falsehoods often enough and loudly enough to ensure that someone, sooner or later, will believe them.

A. The Proposed Order's Denial of LAZ's $36,625.07 Claim Under Count V Errs Because it Violates the Law-of-the-Case Doctrine

The Proposed Order's denial of LAZ's claim under Count V violates Illinois' law-of-the-case doctrine because the Rule 216 issues that Comed has sought to perpetually re-litigate were finally and decisively resolved by February 13, 2014 Order and the March 9, 2015 Order.

> The rule of the law of the case is a rule of practice, based on sound policy that, where an issue is once litigated and decided, that should be the end of the matter

> and the un-reversed decision of the question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit.

McDonalds Corp. v. Vittorio-Ricci Chicago, Inc. 125 Ill. App. 3d 1083, 1086-87 (1st Dist. 1984), cited with approval in *McHugh v Kottke Associates, LLC,* 2015 IL App 142750-U, at par. 37.

Because ComEd's challenges to its Rule 216 admissions have already been thoroughly litigated, argued, re-litigated through a repetitive motion for reconsideration, and ruled on twice (in LAZ's favor), the Proposed Order's denial of LAZ's $36,625.07 claim under Count V of the Complaint violates the Illinois law-of-the-case doctrine.

B. The Proposed Order Errs in Holding that Supreme Court Rule 201(j) Controls Over Rule 216

1. The Proposed Order's Elevation of Supreme Court Rule 201(j) Over Rule 216 Defies Basic Principles of Statutory Construction

As the Proposed Order correctly points out, S. Ct. R. 201(j) provides that the disclosure of any matter obtained by discovery is not conclusive and may be contradicted by other evidence. But while requests for admissions are discovery tools, not all admissions are obtained pursuant to Rule 216. Thus, the general discovery provisions under rule 201(j) do not control the specific (and exacting) provisions and requirements for formal requests for admissions made pursuant to Rule 216.

Well-settled principles of statutory construction under Illinois law call for the specific to control over the general. *People v. Singleton*, 103 Ill. 2d 339, 345 (1984). The Proposed Order contravenes that principle by qualifying the specific request for admission requirements of Rule 216 by the general discovery provision of S. Ct. Rule 201(j)

In situations in which a party has made an admission against interest through some discovery tool, such as a deposition, S. Ct. R. 201(j) allows that party to introduce evidence contrary to that admission. *Rose v. City of Chicago*, 317 Ill. App. 1, 35 (1st Dist. 1942). But this discovery rule of general application does not control admissions made under the specific requirements of Rule 216.

ComEd's failure to respond properly to LAZ's Rule 216 requests for admissions means those requests are binding judicial admissions of fact. *Hubney v. Chairse*, 305 Ill. App. 3d. 1038, 1043 (2nd Dist. 1999).

2. The Proposed Order's Elevation of Rule 201(j) Eviscerates Rule 216

The Proposed Order purports to read and construe together Rule 216 and S. Ct. R. 201(j). If the Proposed Order's construction of the interaction of these discovery rules is correct, then one may quite legitimately ask why any litigant would bother to comply with all of the formal and exacting requirements for propounding requests for admission under Rule 216 if all of its work can be overturned by the respondent's mere introduction of contrary evidence under S. Ct. R. 201(j). In short, the Proposed Order renders Rule 216 a dead letter.

3. The Proposed Order's Reliance on Rule 201(j) Entirely Lacks Support

The Proposed Order denies LAZ's complaint under Count V by elevating the general discovery provision of S. Ct. R. 201 (j) over Rule 216. Yet the Proposed Order fails to cite any authority in support of this position. Throughout this case LAZ has cited all or nearly all major Illinois decisions on Rule 216, all of which are to the effect that Rule 216 admissions are judicial admissions that are removed from contention and cannot be contradicted by other evidence by the admitting party. Yet without any citation to supporting authority, the Proposed Order holds

that ComEd's submission of evidence contrary to its Rule 216 admission overturns that admission. In this the Proposed Order turns on its head the entire body of Illinois jurisprudence on Rule 216.

C. The Proposed Order Errs in Denying LAZ's $36,625.07 Claim Under Count V in Reliance on *People v Strasbaugh*

The Proposed Order also relies on *People v.Strasbaugh*, 194 Ill. App. 3d. 1012 (4th Dist. 1990) to relieve ComEd of the burden of its failure to properly respond to LAZ's Rule 216 requests to admit. But *Strasbaugh* is both inapposite and bad law, and its statements on Rule 216 are dicta.

In *Strasbaugh*, a defendant served Rule 216 requests for admission on the State of Illinois in a driver's license suspension case. 194 Ill. App. 3d. at 1013. The State failed to respond to these requests to admit, and the defendant moved for summary judgment on the basis of those Rule 216 admissions. 194 Ill. App. 3d. at 1014. The trial court denied defendant's motion for summary judgment and the matter proceeded to trial. 194 Ill. App. 3d. at 1014-15. The defendant driver lost at trial.

However, the issue on appeal in *Strasbaugh* was not the propriety of any Rule 216 admission or the receipt into evidence of matter contrary to a party's Rule 216 admissions. The issue appealed by the *Strasbaugh* defendant was whether the trial court had improperly denied its motion for summary judgment. 194 Ill. App. 3d. at 1016. That the defendant based its motion for summary judgment on Rule 216 admissions was tangential to the issue on appeal. The *Strasbaugh* court's holding is narrow and limited: denial of a motion for summary judgment is not appealable after a party has proceeded to trial on the merits. 194 Ill. App. 3d. at 1016. All of the *Strasbaugh* court's statements on Rule 216 are therefore dicta and have subsequently been

severely criticized as such.

For example, *People v. Mindhan*, 253 Ill. App. 3d 792 (2nd Dist. 1993) involved a factual situation remarkably similar to that of *Strasbaugh*: a summary suspension of a defendant's driver's license, the defendant's issuance of Rule 216 requests for admission to the State, and the State's failure or refusal to make any response to those requests to admit. 253 Ill. App. 3d at 793-94. The trial court deemed all of the facts in the defendant's' requests admitted even though, just as ComEd does in this Docket, the State showed that the Rule 216 admissions in question contradicted both the actual traffic citation issued at the time of the accident and the arresting officer's sworn accident report. 253 Ill. App. 3d. at 795. *Mindhan* destroys the Proposed Order's reliance on *Strasbaugh*.

D. How ComEd's Rule 216 Admissions Came About

A review of how this Docket resulted in extensive Rule 216 arguments merits study because it sweeps away ComEd's duplicitous and hypocritical claims that allowing its Rule 216 admissions to stand undermines the integrity of evidentiary processes prescribed by Commission Rules. ComEd's Rule 216 arguments about its admissions must be viewed in light of these facts, which, of course, ComEd would prefer that the Commission ignore. ComEd's vociferous and repeated bromides about the integrity of the Commission's fact-finding process are like demands that a doctor review only the fever chart at the foot of the patient's bed, but should make no inquiry whatsoever into the cause of the patient's fever.

Fortunately, that review is much clearer and simpler than ComEd's obfuscations might otherwise indicate. For among the vast and confused tangle of its much-labored and meretricious arguments against its Rule 216 admissions there appears one single unraveling thread: its

dripping contempt for LAZ's complaint in general and LAZ's data requests in particular. That contempt overflowed in its responses to LAZ's Rule 216 requests to admit. ComEd's professed shock and surprise[7] arise not from the Commission's recognition of Rule 216 in its dockets, but rather from the fact that the consequences of its contempt fell on its own head.

1. ComEd Rejected All of LAZ's Good Faith Efforts to Resolve Discovery Issues in 2012

Consonant with the Commission's preference for informal over formal discovery methods, Comm. Rule 200.340, LAZ issued data requests and interrogatories to ComEd on July 16, 2012. LAZ had issues with ComEd's responses. On August 24, 2012, LAZ wrote to ComEd specifying these issues and specifically offering pursuant to S. Ct. R. 201(k) and Comm. Rule 200.350 to confer by telephone with ComEd's counsel on any of three specified dates, at their convenience. See Exhibit B attached to this Brief. ComEd ignored LAZ's offer to confer by telephone on these discovery issues but did, in a subsequent telephone conversation, state that it would reply to LAZ's letter of August 24 by September 7, 2012.

September 7, 2012 came and went. LAZ received no communication from ComEd.

On September 10, 2012, LAZ wrote again to ComEd and renewed its request to confer on discovery issues. See Exhibit C to this Brief.

On September 12, 2012, ComEd responded to LAZ's letter of September 8, but there remained certain open discovery questions. LAZ therefore wrote again to ComEd regarding these unresolved issues on September 17, 2012. See Exhibit D to this Brief.

ComEd ignored LAZ's September 17, 2012 letter.

On October 5, 2012, LAZ served ComEd with requests for admission. ComEd served

[7] *E.g.*, Respondent's Response in Opposition to LAZ Parking's Motion to Deem Certain Facts Admitted Pursuant to Requests for Admission and Responses Thereto, at pg. 7.

LAZ with its responses on October 28, 2012. As detailed in LAZ's Motion to Deem Admitted, ComEd admitted certain requests, but every one of ComEd's denials were deficient under Rule 216.

In pleadings relating to these requests for admission, ComEd then asserted that LAZ had never attempted to confer with ComEd to resolve discovery issues. (*See* ComEd Response to Motion to Deem Admitted, pages 2, 6-7 and 7). ComEd did not deign to confer with LAZ on discovery issues until after LAZ had filed its Motion to Deem Admitted.

Thus, while ComEd clothes its arguments against Rule 216 in August language about the integrity of the Commission's fact-finding process, there can be no more conspicuous example of contempt for that process than ComEd's own behavior during the discovery phase of this Docket.

II. EXCEPTION 2: The Proposed Order Errs in Its Discussion of the Amcor Flexibles Docket

The Proposed Order discusses the *Amcor Flexibles* docket, Ill. C. C. Docket No. 11-0033, which involves a similar factual situation. However, contrary to the statements in the Proposed Order, the meter at issue in *Amcor Flexibles* case was also a transformer rated meter. Also, on July 21, 2016, the Illinois Appellate Court reversed the Commission's order in *Amcor Flexibles* in favor of ComEd. 2016 IL App. (1st) 152985-U.

Accordingly, LAZ requests the following modification to the text of the Proposed Order:

VI. COMMISSION ANALYSIS AND CONCLUSION

A. Testing and Inspection

1. Meter /Transformer Measuring Units

...

As a preliminary matter, the Commission notes that ~~this case is distinguishable from~~while ComEd cites for support of its position the Commission's order in its favor in Amcor Flexibles, Inc. v. Commonwealth Edison Company, Docket No. 11-0033 ("Amcor")~~. The meter at issue in that case was a self-contained solid state unit. The~~, on July 21, 2016 the Illinois Appellate Court reversed that order and ruled in favor of the complainant. *Amcor Flexibles v. ICC and Commonwealth Edison*, 2016 IL App (1st) 152985-U. Like Amcor, the metering installation in this docket consists of a meter and three current transformers. ~~Unlike the meter in Amcor, t~~The ~~meter/transformer~~meter/ transformer unit has multiple components that must be integrated with the billing system at the time of installation and can only function when properly programmed and working together. Inherent in the proper installation of this multiple component metering installation is the communication of the operating parameters of the meter/transformer combination from the metering system location to the billing system. To insure that a proper meter/transformer installation has taken place, a post installation inspection of meters with associated instrument transformers must be made within 90 days pursuant to Section 410.155. In the absence of correct programming from the installation site and/or corrections arising from an on-site, post installation inspection, the under billing sanctions of Section 410.200(h)(1) apply.

III. EXCEPTION 3: The Proposed Order Errs in Adopting ComEd's Misstatement of Certain of LAZ's Arguments Concerning Its Continual Re-litigation of Its Rule 216 Admissions

As stated earlier, ComEd has never – ever – ceased to re-litigate not only the application of Rule 216 in Commission proceedings generally, but also each of its Rule 216 judicial admissions individually, despite the ALJ's Orders of February 13, 2014 Order and March 9, 2016. See Exhibit A to this Brief on Exceptions.

To set the record straight, LAZ in its Reply to ComEd's Response to LAZ's First Motion in Limine filed on March 14, 2016 referred to ComEd's continual re-litigation of these settled issues in nearly every pleading it filed as a case of "**juridical** Tourette's." LAZ did **not**, as ComEd has misquoted it, state that ComEd had "judicial Tourette's." The word "judicial" is not the same as the word "juridical." They do not have the same meaning. It is not the responsibility of LAZ's counsel to remedy its opposing counsel's deficiencies in vocabulary or reading comprehension. Rather, if opposing counsel wishes to complain about something in LAZ's pleadings, it is the responsibility of opposing counsel to get right what bothers them.

Accordingly, LAZ requests the following modification to Section V - ComEd's Position, A. - Billing Error vs. Meter Error

> **V. COMED'S POSITION**
>
> **A. Billing Error vs. Meter Error**
>
> ...

ComEd argued that in order to compensate for the lack of merit in its case, LAZ rails against ComEd – accusing ComEd of being a "recidivist utility" and of suffering from "judicial Tourette's syndrome." (The Commission notes, however, that ComEd mis-quotes LAZ. The actual term used was "juridical Tourette's." See LAZ Reply to Response of ComEd to First Motion *In Limine* (filed March 14, 2016) at ~~9;~~pg. 8, par. 1, line 5). ComEd cites to LAZ Second Motion *In Limine* (March 11, 2016) at 2. ComEd further stated that LAZ has in effect waged war against ComEd, filing five motions to strike and obtaining and using patently false "admissions." ComEd argued that it admitted only that it made a billing mistake. ComEd stated that it regrets making that mistake. ComEd argued, LAZ's own expert admitted that ComEd's policies and procedures regarding testing and accuracy comply with the regulations. According to ComEd, the Commission should enter judgment in favor of ComEd. ComEd Init. Br. at 2-3.

IV. Oral Argument Requested

LAZ hereby requests oral argument.

V. Conclusion

WHEREFORE, LAZ Parking LTD, LLC requests that the Commission revise the Proposed Order as requested above.

Dated: September 16, 2016

Respectfully submitted,

LAZ PARKING LTD, LLC

By: /s/ ***Paul G. Neilan***
Its Attorney

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Attachments:

Exhibit A	Schedule of ComEd Re-Litigation of Rule 216 Issues
Exhibit B	Letter dated August 24, 2012, LAZ to ComEd
Exhibit C	Letter dated September 10, 2012, LAZ to ComEd
Exhibit D	Letter dated September 17, 2012, LAZ to ComEd